

PEARSON, J.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

RICHARD MARTIN,	)	
	)	CASE NO. 1:09CV0378
Petitioner,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
RICHARD HALL, Warden,	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	<b><u>AND ORDER</u></b>
Respondent.	)	[Resolving <a href="#">ECF No. 12</a> ]

*Pro se* Petitioner Richard Martin filed a Petition for a Writ of Habeas Corpus pursuant to [28 U.S.C. § 2254](#) ([ECF No. 1](#)), alleging ten (10) grounds for relief which challenge the constitutional sufficiency of his conviction and sentence. Petitioner also requests an evidentiary hearing and appointment of counsel.

The case was referred to Magistrate Judge William H. Baughman, Jr. for a Report and Recommendation. The Magistrate Judge subsequently issued a Report & Recommendation ([ECF No. 9](#)). In his Report, the Magistrate Judge recommends that the Court dismiss in part and deny in part the petition without further proceedings. Petitioner filed Objections to the Magistrate Judge's Report ([ECF No. 12](#)). This Court, after reviewing the objections, hereby adopts the Report and dismisses in part and denies in part the petition.

**I. Facts**

In April 2006, Petitioner was indicted on two counts of possession of marijuana (Counts One and Four), two counts of trafficking in marijuana (Counts Two and Five), and one count of

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possession of criminal tools (Count Six).<sup>1</sup> Each of the drug possession and trafficking counts were accompanied by a firearm specification. Prior to trial, Petitioner moved to suppress all evidence obtained in the police search of the premises where the narcotics were found and Petitioner was arrested. An evidentiary hearing was conducted on the suppression issues and the State trial court denied the motion. A jury trial commenced on September 7, 2006. Following the close of the State's evidence, the trial court granted Petitioner's motion for acquittal under [Ohio Criminal Procedure Rule 29](#) as to the firearm specifications connected to Counts One and Two. The jury returned findings of guilt as to Counts One, Two, Four, Five, and Six, but found Petitioner not guilty as to the remaining firearm specifications. On October 18, 2006, Petitioner was sentenced to concurrent sentences of: (1) five years in prison for Counts One and Two (the drug possession and trafficking offenses involving marijuana in an amount equal to or exceeding 5,000 grams but less than 20,000 grams); (2) eight years for Counts Four and Five (the drug possession and trafficking offenses involving 20,000 grams or more of marijuana); and (3) one year for Count Six (possession of criminal tools). Petitioner appealed his conviction and sentence in state court, raising numerous issues. All of Petitioner's appeals at the state level have been exhausted.

On February 18, 2009, Petitioner filed the instant petition for a writ of habeas corpus.

## **II. Standard of Review for a Magistrate Judge's Report and Recommendation**

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<sup>1</sup> Count Three did not apply to Petitioner. Petitioner was indicted with co-defendants Dexter Jordan and Tajmahal Frazer. Count Three, having a weapon while under disability in violation of [Ohio Rev. Code § 2923.13](#), only applied to co-defendant Tajmahal Frazer. See Indictment ([ECF No. 5-1 at 4-5](#)).

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Where objections have been made to the Magistrate Judge's Report and Recommendation, the District Court standard of review is *de novo*. [Fed. R. Civ. 72\(b\)\(3\)](#).

A district judge:

must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

[\*Id.\*](#)

Accordingly, this Court has conducted a *de novo* review of the portions of the Magistrate Judge's Report to which Petitioner has properly objected.

### III. Law & Analysis

#### A. Objection 1

Petitioner objects to the Magistrate Judge's reference to the fact stated in the decision of the Ohio Court of Appeals that he "was wearing latex gloves" when he was arrested.<sup>2</sup> See [State v. Martin, No. 89030, 2007 WL 3376886, at \\*2 \(Ohio App. Nov. 15, 2007\)](#). The Ohio Court of Appeals also referenced the latex gloves when considering Petitioner's claim of denial of due process caused by the loss or destruction of the latex gloves. See [Martin, 2007 WL 3376886, at \\*8](#).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "requires heightened respect for [S]tate court factual and legal determinations." [Herbert v. Billy, 160 F.3d](#)

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<sup>2</sup> In his seventh ground for relief, Petitioner alleged a violation of due process when the latex gloves he was allegedly wearing when arrested were lost or destroyed by the State.

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[1131, 1134 \(6th Cir. 1998\)](#). Accordingly, a federal court must apply the presumption of correctness to State court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. See [Warren v. Smith, 161 F.3d 358, 360-61 \(6th Cir. 1998\), cert. denied, 527 U.S. 1040 \(1999\)](#). The Court concludes that Petitioner has failed to rebut the presumption of correctness of the State appellate court's findings of fact by producing "clear and convincing" evidence of their incorrectness, as required by [28 U.S.C. § 2254\(e\)\(1\)](#).

Moreover, contrary to Petitioner's first objection, the Magistrate Judge sufficiently dealt with the assertions put forth by Petitioner in the Traverse regarding the denial of due process resulting from the latex gloves that were not preserved as evidence by the State.

In the record before the Court, Petitioner has failed to show that the State Court's adjudication of this matter resulted in a decision that was contrary to, or involved an unreasonable application of established Federal law, [28 U.S.C. § 2254\(d\)\(1\)](#), so as to permit this Court to grant his application with respect to the claims alleged in his seventh ground for relief or the latex gloves, in general. Petitioner's first objection is overruled.

**B. Objection 2**

Next, Petitioner objects to the recommendation of the Magistrate Judge that Petitioner's requests for appointment of counsel and an evidentiary hearing be denied. The Court agrees with the Magistrate Judge that the record in the case at bar does not indicate that the appointment of counsel or an evidentiary hearing are necessary. An evidentiary hearing, which [28 U.S.C. § 2254\(e\)\(2\)](#) provides for, is not warranted when it would be futile or when, as here, the existing

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record is complete and no fact that could be developed would result in the granting of the writ.

*McAdoo v. Elo*, 365 F.3d 487, 500 (6th Cir.2004)).

Furthermore, the determination to appoint counsel for a federal habeas petitioner is within the discretion of the court and is required only where the interests of justice or due process so require. 18 U.S.C. § 3006A(a)(2)(B); *Mira v. Marshall*, 806 F.2d 636, 638 (6th Cir. 1986).

Appointment of counsel in a habeas proceeding has been found to be mandatory only if the court determines that an evidentiary hearing is necessary. Rule 8(c), Rules Governing § 2254 Cases.

Where no evidentiary hearing is required, as in the instant case, the court will often consider (1) the factual complexity of the case, (2) legal complexity of the case, and (3) petitioner's ability to investigate and present her claims, along with any other relevant factors. *Gammalo v. Eberlin*,

No. 1:05CV617, 2006 WL 1805898, at \*2 (N.D. Ohio June 29, 2006) (Boyko, J.) (citing *Hoggard v. Purkett*, 29 F.3d 469 (8th Cir. 1994). The record fails to reflect that the interests of justice or due process require the appointment of counsel in this case. To the contrary, the record reflects that Petitioner has effectively argued his position. Petitioner's second objection is overruled.

### **C. Objection 3**

Third, Petitioner objects to the recommendation of the Magistrate Judge that the Court dismiss the four search warrant claims (Grounds One through Four) as barred from review by this Court under *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an

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unconstitutional search or seizure was introduced at his trial”). [Ohio Criminal Procedure Rule 12\(C\)\(3\)](#) provides for pretrial motions to suppress evidence because it was illegally obtained. [Ohio Criminal Procedure Rule 12\(F\)](#) provides in pertinent part “[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record.”

Petitioner argues that the State trial court violated his due process rights by denying the motion to suppress all evidence obtained in the police search of the Gardenview Drive home because it failed to issue any findings of fact. The Court agrees with the Magistrate Judge’s determination that Ground Two, plus three of the purported violations of State law arising in connection with the motion to suppress (Grounds One, Three, and Four), be resolved under *Stone*—which prohibits Fourth Amendment claims in section 2254 actions if the State proceedings provided a full and fair opportunity for petitioner to litigate those claims--because those alleged errors occurred as part of the State court’s adjudication of the Fourth Amendment claims. *See* ECF No. 9 at 24-25. Petitioner received, at his suppression hearing and on the appeal therefrom, all the process he was due from the State of Ohio under *Stone*, thus precluding this Court from proceeding to consider the merits of Grounds One through Four. Petitioner’s third objection is overruled.

**D. Objection 4**

The Sixth Circuit Court of Appeals utilizes a two-step analysis to determine whether a defendant was given a full and fair opportunity to litigate a Fourth Amendment claim in State court: “First, the court must determine whether the [S]tate procedural mechanism, in the abstract, presents the opportunity to raise a [F]ourth [A]mendment claim. Second, the court must

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determine whether presentation of the claim was in fact frustrated because of that mechanism.”

*Machacek v. Hofbauer*, 213 F.3d 947, 952 (6th Cir. 2000) (internal quotations omitted).

Petitioner argues that in the context of Ohio Criminal Procedure Rule 12(F) “where the state court refused to abide by its procedure, the mechanism supposedly in place has been frustrated to a point where the procedure is rendered meaningless which rises to a denial of due process and cannot survive constitutional muster.” ECF No. 12 at 9. This objection lacks merit. Pursuant to Ohio law, Petitioner filed a pretrial motion to suppress and appealed the denial of the motion. Because the State of Ohio provided a full and fair opportunity for Petitioner to litigate his Fourth Amendment claim, the Court concludes that claim is not cognizable on federal habeas review. *Harding v. Russell*, 156 Fed.Appx. 740, 745 (6th Cir. 2005). Petitioner’s fourth objection is overruled.

#### **E. Objection 5**

Fifth, Petitioner

objects to the Magistrate [Judge]’s inference that [Petitioner] argues that Stone v. Powell is no longer good law. *Id.* 428 U.S. 465 (1976); ECF #9, p. 25 n.91. [Petitioner] argues that Stone, must be revisited, and possibly expanded where state courts purposely misapply Supreme Court precedent to Fourth Amendment claims in affording a defendant a “kangaroo court suppression hearing” knowing that its adjudication will not be subject to federal scrutiny because of Stone.

ECF No. 12 at 10. Petitioner cannot obtain habeas relief on Grounds One through Four because he was given a full and fair opportunity to litigate his Fourth Amendment claim in State court. *See* Stone, 428 U.S. at 494-95. The Ohio Rules of Criminal Procedure and Appellate Procedure provide defendants with an adequate procedural mechanism to assert a Fourth Amendment claim. *Riley v. Gray*, 674 F.2d 522, 526 (6th Cir. 1982). Furthermore, Petitioner took advantage of

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these procedural opportunities by filing a pretrial motion to suppress evidence ([ECF No. 5-1 at 7-14](#)), which was denied after a full hearing ([ECF No. 5-1 at 31](#)). Petitioner appealed his conviction and the trial court's denial of his motion to suppress; and the Ohio appellate court found that the trial court correctly denied the motion to suppress. [State v. Martin, No. 89030, 2007 WL 3376886, at \\*5 \(Ohio App. Nov. 15, 2007\)](#). Petitioner's fifth objection is overruled.

#### **F. Objection 6**

Next, Petitioner objects to the recommendation of the Magistrate Judge that Grounds Six, Eight, and Ten are procedurally defaulted or waived. The Magistrate Judge correctly notes that Petitioner "did not respond in his traverse to the State's arguments of procedural default as to any of these claims, offering neither a cause and prejudice analysis as to any claim nor an assertion of actual innocence." [ECF No. 9 at 32](#).<sup>3</sup>

##### **1. Ground Six**

In Ground Six, Petitioner asserts that it was a denial of due process that only a fraction of all the marijuana seized was randomly tested. At trial, however, Petitioner stipulated to the drug testing results. See [Martin, 2007 WL 3376886, at \\*7](#) ("the reports detailing the lab results of the Bureau of Criminal Investigation's ("BCI") testing of the drugs were entered into evidence by stipulation and without objection"). The Magistrate Judge recommends that Ground Six be dismissed as procedurally defaulted. [ECF No. 9 at 33](#). The Court finds that the Magistrate Judge's analysis is correct and therefore adopts the recommendation.

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<sup>3</sup> [28 U.S.C. § 2248](#) states that, if not traversed by Petitioner, "[t]he allegations of a return to the writ of habeas corpus . . . shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."



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## **2. Ground Eight**

Ground Eight is a claim arguing that it was a *Blakely*<sup>4</sup> violation for the trial court to sentence Petitioner on the basis of facts not found by the jury or admitted to by Petitioner. The Court adopts the recommendation of the Magistrate Judge that Ground Eight also be dismissed as procedurally defaulted. [ECF No. 9 at 34](#). Petitioner failed to raise any objection to his sentence at the time the sentence was pronounced and offers no excuse for such a default.

## **3. Ground Ten**

In Ground Ten, Petitioner asserts that he was denied due process when the trial court denied his oral motion for severance made as the trial was about to begin and he was tried together with a co-defendant. The Magistrate Judge recommends that Ground Ten be dismissed as procedurally defaulted. [ECF No. 9 at 35](#). Petitioner did not observe Ohio's rule as to objections to joinder at trial, and the Ohio appeals court, therefore, properly found this claim to have been waived. See [Martin, 2007 WL 3376886, at \\*9](#). The Court finds that the Magistrate Judge's analysis is correct and therefore adopts the recommendation. See [Boyd v. Money, No.3:04CV7721, 2006 WL 1644534, at \\*7-8 \(N.D. Ohio June 13, 2006\)](#) (Wells, J.) (finding that in Ohio the failure to timely object to joinder qualifies as a procedural default on the basis of Ohio's long-standing contemporaneous objection rule).

Petitioner's sixth objection is overruled.

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<sup>4</sup> [Blakely v. Washington, 542 U.S. 296 \(2004\)](#).

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**G. *Objection 7***

The fifth ground for relief raised in the Petition for a Writ of Habeas Corpus ([ECF No. 1](#)) is:

[D]ue process requires, in a criminal proceeding [at its most primary and fundamental] concept, that as a crime does not make its doer guilty, a person charge with crime must be said to have participated in and been a party to such criminal acts or omissions. see: *Berger v. United States*, 295 U.S. 78, 88 (1935); and, *Carter v. Rafferty*, \_\_\_ U.S. \_\_\_ (citation omitted).

[ECF No. 1-2 at 19](#).<sup>5</sup>

In his seventh objection, Petitioner argues that in determining that there was sufficient evidence to convict him, the Magistrate Judge improperly applied the standard announced in [Jackson v. Virginia, 443 U.S. 307, 318-19 \(1979\)](#) (“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”) (emphasis in original). This argument is without merit. The Magistrate Judge correctly recommends that Ground Five be denied on the merits as the State court decision in this regard was neither an unreasonable application of, nor contrary to, clearly established federal law. [ECF No. 9 at 23; 40](#). Therefore, Petitioner’s seventh objection is overruled.

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<sup>5</sup> Petitioner did not offer any new arguments as to this claim in his traverse. *See* [ECF No. 9 at 36](#).

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#### **IV. Conclusion**

Petitioner's requests for appointment of counsel and an evidentiary hearing are denied because the claims require no further factual development.

The Court certifies, pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. [28 U.S.C. § 2253\(c\)](#); [Fed. R. App. P. 22\(b\)](#).

IT IS SO ORDERED.

February 23, 2012  
Date

/s/ Benita Y. Pearson  
Benita Y. Pearson  
United States District Judge